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Nos. 99-5, 99-29

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, *Petitioner*,

v.

ANTONIO J. MORRISON AND JAMES LANDALE CRAWFORD, *Respondents*.

CHRISTY BRZONKALA, *Petitioner*,

v.

ANTONIO J. MORRISON AND JAMES LANDALE CRAWFORD, *Respondents*.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI

Michael E. Rosman (Counsel of Record)
Hans F. Bader
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St., NW, Suite 300
Washington, DC 20036
(202) 833-8400

Attorneys For Antonio Morrison
(Additional Counsel Listed On Inside)

W. David Paxton
GENTRY LOCKE RAKES
& MOORE
800 Crestar Plaza
P.O. Box 40013
Roanoke, VA 24038-0013

Attorneys For Antonio
Morrison

Joseph G. Painter, Jr.
Post Office Drawer A
Blacksburg, VA 24063-
1015

Attorney for James L.
Crawford

QUESTIONS PRESENTED

1. Is a federal law that provides a civil remedy for a victim of a violent felony, perpetrated by a private individual motivated by an animus based upon gender, a law within Congress's power to regulate "commerce among the several states, with foreign nations, and with the Indian tribes"?

2. Is a federal law that provides a civil remedy for a victim of a violent felony, perpetrated by a private individual motivated by an animus based upon gender, a law within Congress's power to enforce the Constitutional provision stating that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"?

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Respondents Antonio J. Morrison and James Landale Crawford submit this brief in opposition to the separate petitions for writ of certiorari by the United States ("U.S. Pet.") and Christy Brzonkala ("Brzonk. Pet.").

As set forth below, petitioners can supply one, and only one, legitimate reason for this Court to grant their petitions: the court below declared an act of Congress unconstitutional in the context of this case. The scope of Congressional authority to legislate under the Constitution is an important issue. But this Court's rules generally require more for an exercise of its discretionary jurisdiction, viz., a conflict between two or more courts of appeals or a departure from the "accepted and usual course" of judicial proceedings so as to warrant this Court's exercise of its supervisory powers. Sup. Ct. Rule 10. As shown below, no additional consideration is present here.

STATEMENT OF THE CASE

A. Allegations Of The Complaint

The order of the court below affirmed a judgment of the District Court dismissing the action upon a Rule 12(b)(6) motion for failure to state a claim. Accordingly, for purposes of this brief, Morrison and Crawford must assume the truth of the allegations set forth in the amended complaint (the "Complaint") in this action.

Brzonkala is a resident of Fairfax, Virginia. Complaint ¶ 7. The Complaint in this action alleges that Morrison and Crawford engaged in a sexual assault on Brzonkala "[o]n the night of September 21-22, 1994" in "a student room on the third floor" of Brzonkala's dormitory at Virginia Polytechnic Institute and State University ("Virginia Tech"). Complaint ¶ 13. It further alleges

that, after the assault, Morrison "clad only in his underwear followed wordlessly behind plaintiff" through the dorm building, from the third floor to Brzonkala's suite on the second floor. Complaint ¶ 23. Sometime within the next five months -- the Complaint does not say when -- Morrison reportedly was overheard in the dining hall saying "I like to get girls drunk and f**k the s**t out of them." Complaint ¶ 31. But the Complaint asserted that Brzonkala "reported that she was not inebriated at the time of the assaults." Complaint ¶ 14.

The Complaint concedes that Brzonkala did not preserve any physical evidence from this alleged rape and "did not bring criminal charges against Morrison or Crawford." Complaint ¶ 33; App. 191a (Niemeyer, J., concurring). Nonetheless, Brzonkala "approved and . . . participat[ed] in a [subsequent] criminal investigation about events which occurred on September 21-22, 1994 by the Virginia State Police." Complaint ¶ 4. The record does not disclose the outcome of that investigation.

This action was commenced on or around December 27, 1995 with the filing of the original complaint. Both the original complaint and the amended complaint sought a remedy pursuant to 42 U.S.C. § 13981, which is the main part of Subtitle C of Title IV of Public Law 103-322 (hereinafter, "Subtitle C" or "Section 13981"). This law was passed on September 13, 1994, just a few days before the purported rapes alleged in the Complaint.

B. Statutory Background

Subtitle C provides a tort remedy for a "crime of violence motivated by gender." That key phrase is defined to mean "a crime of violence committed because of

gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1) (emphasis added). There are, then, two requirements that a plaintiff must state and prove, each of which should be given independent meaning: (1) the crime of violence must be perpetrated because of gender and (2) the act must be perpetrated with a gender-based animus. Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995) (Court should "avoid a reading which renders some words altogether redundant.").

Although Congress left it to the courts to determine the meaning of these requirements, it made clear that it did not believe that all rapes or violent attacks against women would be covered. See S. Rep. 103-138 at 51 (1993) (the civil remedy "does not create a general Federal law for all assaults or rapes against women"). So, too, the legislative history makes clear that Subtitle C was not designed to cover most cases of domestic violence. S. Rep. 102-197, at 69 (1991) (the civil remedy "does not cover everyday domestic violence cases . . . This is stated clearly in the committee report and it is the only fair reading of the statutory language") (Statement by bill sponsor, Sen. Joseph Biden).

Although ostensibly motivated by "systemic" bias in state courts, Subtitle C gives state courts concurrent jurisdiction. 42 U.S.C. § 13981(e)(3). Moreover, if a claim is brought in state court, neither party can remove. 28 U.S.C. § 1445(d); Pub. L. 103-322, § 40302(e)(5). See Brzonk. Pet. 7 n.8. No prior criminal "complaint, prosecution, or conviction" is required for an action to be brought. 42 U.S.C. § 13981(e)(2). Prevailing plaintiffs in claims brought under Section 13981 are entitled to recover their reasonable attorneys' fees. See 42 U.S.C.

§ 1988(b); Pub. L. 103-322, § 40303.

The four-year statute of limitations set forth in 28 U.S.C. § 1658 would apply to any claim under Section 13981. This is much longer than the limitations periods for intentional torts in Virginia and most other states. Va. Code Ann. § 8.01-243 (Michie's 1996) (two years).

C. Proceedings In The Courts Below

The original complaint was filed on or about December 27, 1995. After both Virginia Tech and Morrison moved to dismiss, the parties agreed that plaintiff would file an amended complaint and that defendants would respond expeditiously thereto.

The amended complaint added two new parties, Cornell Brown and William Landsidle and a variety of new claims. (Claims against both of these parties were eventually dismissed, the claims against Brown based in part on plaintiff's own motion for voluntary dismissal.) Plaintiff asserted claims against Morrison and Crawford under Subtitle C and under state tort law. Shortly thereafter, defendants Morrison and Crawford moved to dismiss the Complaint on the grounds that the Complaint failed to state a claim under Subtitle C, that Subtitle C could not be constitutionally applied to them, and that the court had no jurisdiction over the state tort claims. The United States intervened to defend the constitutionality of Subtitle C.

1. The District Court's Decision. -- The District Court dismissed plaintiff's claims under Section 13981 in an order and judgment dated July 26, 1996. The pendent state claims were dismissed without prejudice. App. 402a-03a.

The District Court first addressed respondents' contention that the Complaint did not adequately allege "gender animus." The court rejected that argument, citing the allegations in the Complaint that (1) Morrison and Crawford allegedly engaged in "gang rape"; (2) the rapes were closer to "stranger rape" than "date rape" which made them less likely, according to the Court, to involve a misunderstanding, personal animus, or overheated sexual passion; and (3) some months after the alleged incident, Morrison was allegedly overheard saying that he liked to "get girls drunk and f**k the s**t out of them." App. 359a-60a. The court did not decide whether a claim had been alleged against Crawford. App. 361a-62a.

The District Court then analyzed the constitutionality of Subtitle C, considering first whether Section 13981 could be justified as legislation designed to "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8. The court carefully applied this Court's reasoning in United States v. Lopez, 514 U.S. 549 (1995), holding that Congress exceeded its authority under the Commerce Clause in passing 18 U.S.C. § 922(q), the Gun-Free School Zones Act ("GFSZA"). Considering the three permissible categories of regulation that the Supreme Court had identified in Lopez (viz., regulating the channels of interstate commerce, regulating the instrumentalities of interstate commerce, and regulating activity that substantially affects interstate commerce), the District Court concluded, just as in Lopez, that the first two categories were inapplicable. App. 363a-64a.

The District Court then considered four factors from this Court's opinion in Lopez to determine whether Subtitle C was a proper exercise of Congress's authority

under the third category: (1) whether the regulated activity is economic in nature, (2) the presence of a jurisdictional requirement in the law itself, (3) the importance of legislative history, and (4) the practical implications of accepting an argument that the regulated activity "substantially affects" interstate commerce. App. 365a-69a.

The District Court compared the similarities and differences between Subtitle C and the GFSZA and concluded that the similarities (like the non-economic nature of the activity being regulated, the absence of any jurisdictional requirement, and the practical implications of recognizing the effects on commerce of the regulated activity as "substantial") outweighed the differences. It considered three possible differences: (1) that Congress made more extensive findings with respect to Subtitle C than it had with the GFSZA; (2) that Subtitle C provides for civil liability rather than criminal; and (3) that "fewer steps of causation" are involved in going from the regulated activity to an effect on interstate commerce. App. 371a-76a.

With respect to congressional findings underlying Subtitle C, the District Court found that the Lopez Court specifically had denied any necessity for Congress to make findings. In addition, it recognized that Congress had amended the GFSZA to add such findings (and that such findings were before the Court when Lopez was argued and decided),[1] and that the Court specifically considered

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[1] In Section 320904 of Public Law 103-322, Congress amended the GFSZA to set forth findings that crime is a nationwide problem which is exacerbated by the interstate movement of drugs, guns, and criminal gangs; firearms and their component parts move easily in interstate commerce and guns have been found in increasing numbers around schools; citizens fear to travel through certain parts of the country due

(continued...)

the effects on interstate commerce that had been proffered by the Solicitor General. Accordingly, the District Court concluded that the existence of legislative findings for Subtitle C did not distinguish Lopez. App. 371a-73a.

With respect to the civil nature of Section 13981, the District Court simply noted that the Act defines the conduct that it regulates in terms of criminal law (see 42 U.S.C. § 13981(d)(2)(A)) and that, in any event, this Court has never analyzed criminal and civil laws passed pursuant to Congress's Commerce Clause authority any differently. App. 373a-74a.

With respect to the steps of causation, the District Court found any difference unimportant because gun-ownership is sufficiently close to acts of violence -- indeed, the entire body of federal gun control law is based on the assumption that one leads to the other -- and because the alleged effects touted by the government for both laws, such as the unwillingness of people to travel, did not require actual violence, but only the threat of violence. App. 374a-76a.

Because any differences between the two statutes were outweighed by the similarities, the District Court concluded that Congress had no authority to pass Subtitle C as a regulation of interstate commerce. App. 376a-82a.

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[1](...continued)
to concern about violent crime and gun violence; the occurrence of violent crime in school zones has resulted in a decline in the quality of education, which in turn has had an adverse impact on interstate commerce; and States are unable to handle gun-related crime on their own. 18 U.S.C.A. § 922(q)(1) (West Supp. 1996).

In analyzing whether Congress had the authority under Section 5 of the Fourteenth Amendment to reach the private conduct regulated by Section 13981, the District Court began by noting that the Civil Rights Cases, 109 U.S. 3 (1883) precluded any finding that Congress had such authority. App. 385a. Nonetheless, the District Court engaged in an extensive analysis to determine whether Subtitle C could survive a means/ends analysis, presaging to a significant degree this Court's subsequent decision in City of Boerne v. Flores, 521 U.S. 507 (1997). It concluded that remedying private discriminatory acts unrelated in the specific instance to any state rule of conduct or otherwise chargeable to the state was not a legitimate end under the Fourteenth Amendment. App. 391a-98a. The court then concluded that remedying state bias against women was a legitimate end under the Fourteenth Amendment, but that Subtitle C was not "plainly adapted" to that end. App. 399a-401a.

Having concluded that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment of the United States Constitution granted Congress authority to reach the non-economic, private conduct covered by Subtitle C, the court granted the Rule 12(b)(6) motion of Morrison and Crawford. The court declined to exercise supplemental jurisdiction over plaintiff's state law claims.

Shortly after the dismissal of the action in the District Court, plaintiff commenced an action in the Circuit Court of the City of Chesapeake against Morrison and Crawford for common law assault and battery. City of Chesapeake Circuit Court At-Law No. CL96-814. The "motion for judgment" (Virginia's version of a complaint) in that case noted the dismissal of the federal action and stated that "[p]laintiff will not appeal the federal court's

dismissal of her common-law claims, but rather brings those common-law claims under the exclusive jurisdiction of this honorable Court." Plaintiff later non-suited that action, it was dismissed on August 26, 1997, and she has not refiled it.[2]

2. Proceedings In The Fourth Circuit. -- On December 23, 1997, a divided panel of the Fourth Circuit reversed the decision of the District Court. It held that Subtitle C was a legitimate exercise of Congress's Commerce Clause power; accordingly, the majority did not determine whether Section 5 of the Fourteenth Amendment could sustain Subtitle C. App. 282a. On February 2, 1998, the full court vacated the opinion of that panel and ordered the case reheard en banc in March 1998. App. 13a. One year later, the full court affirmed the judgment of the District Court.

Throughout the appellate process -- even after the full Court of Appeals vacated the panel decision and made obvious its concern about the constitutionality of the statute -- neither Brzonkala nor the United States filed any petition for a writ of certiorari with this Court. See 28 U.S.C. § 1254(1) (writ may be granted "before or after rendition of judgment or decree"); Heckler v. Edwards, 465 U.S. 870, 884 (1984) (same). See also 28 U.S.C. § 2101(e) (petition can be made at any time before final

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[2] Although these proceedings are not in the record (App. 191a (Niemeyer, J., concurring)), this Court may take judicial notice of official proceedings in another court. E.g., Burbank-Glendale-Pasadena Airport Authority v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998); Opoka v. Immigration and Naturalization Service, 94 F.3d 392, 394 (7th Cir. 1996) (court "has the power [and] . . . the obligation to take judicial notice of the relevant decisions of courts . . . , whether made before or after the decision under review").

judgment).

The en banc court first concluded that the allegations of the Complaint did state a claim against Morrison, relying almost entirely on Morrison's alleged overheard, offensive statement (at some undefined time in the five months after the alleged sexual assault). App. 14a. The Fourth Circuit did note that the allegations did not "necessarily compel the conclusion that Morrison acted from animus toward women as a class" and "might not even be sufficient, without more, to defeat a motion either for summary judgment or for a directed verdict." Id. It also held that it was "much less clear" whether Brzonkala had stated a claim against Crawford. Id. n.3.[3]

Reaching the constitutional issue, the court first concluded that Subtitle C could not be sustained as an exercise of Congress's Commerce Clause authority. It noted that the phrase "substantially affects interstate commerce" was a term of "legal art" (App. 17a) that required an examination of the factors considered important in Lopez. It cited numerous quotes from Lopez all support-

[3] Because Morrison and Crawford obtained a judgment in the lower court entirely in their favor, they cannot file a cross-petition. Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355, 365 n.8 (1994). However, they are free to raise any argument properly raised that would support the judgment of the court below, and this Court may affirm on any such ground. County of Kent, 510 U.S. at 364; Thigpen v. Roberts, 468 U.S. 27, 30 (1984) (affirming on ground not relied upon by the court below and not addressed in the petition for certiorari). Since a reasonable statutory construction could avoid constitutional questions, Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988), Morrison and Crawford may raise the statutory issue should this Court grant the petition.

ing the proposition that this Court, in concluding that Congress exceeded its powers, placed great emphasis on the non-economic nature of the activity being regulated by the GFSZA. The Fourth Circuit concluded that the non-economic nature of the activity being regulated was an important, if not dispositive, factor in defining the outer limits of the phrase "substantially affects interstate commerce." App. 18a-20a & 20a-22a n.5 (numerous different cites from Lopez majority opinion, concurrences, and dissents).

The court concluded that Subtitle C regulated, and was intended to regulate, non-economic activity, and was not part of a larger regulatory scheme of economic activity. App. 24a-27a. See also U.S. Pet. 3 ("Congress enacted VAWA in 1994 to address 'the escalating problem of violence against women'"). Since, in addition, Subtitle C had no jurisdictional element, the court concluded that it could not be sustained under Congress's authority to regulate "commerce among the several states." App. 31a.

Nonetheless, the en banc court went on to assess other aspects of Subtitle C, under the assumption that the regulation of non-economic activity rendered the statute only presumptively unconstitutional. App. 31a-32a. It noted the arguments identifying the "effects" gender-based, animus-motivated violence has on interstate commerce "closely resemble, and are functionally equivalent to, the arguments advanced by the government in Lopez" (App. 35a), and would "effectively . . . remove all limits on federal authority, and . . . render unto Congress a police power impermissible under our Constitution" (App. 40a). See also App. 90a-91a & 91a-92a n.23 (taking quote from dissent and showing that, by removing the words "gender-based," it equally supports the regulation of

all violent crime). Thus, the court concluded that the other factors identified in Lopez also militated in favor of its conclusions.

The Court of Appeals then proceeded to consider carefully each of the arguments that the government and Brzonkala had proffered to distinguish Lopez. It first rejected petitioners' argument that this Court relied on the absence of Congressional findings in Lopez and/or that it concluded that it would have to "pile inference upon inference" (Lopez, 514 U.S. at 567) to conclude that possession of guns substantially affected interstate commerce solely because of an absence of Congressional findings. App. 52a-64a. The Fourth Circuit concluded that the argument more nearly described the decision of the Fifth Circuit in Lopez, which had relied entirely on the absence of findings, rather than the opinion of this Court. App. 60a-61a. It recognized that this Court specifically had held that legislative findings were not necessary and opined that "one would have to ignore everything the [Supreme] Court said in that opinion, other than its single, passing allusion to the statute's lack of findings" to conclude that the constitutional flaw in the GFSZA could be remedied by such findings. App. 62a. The Fourth Circuit also noted that this Court had findings before it, and that Lopez thus would have been an "unusual case" to announce a rule that Congress must engage in procedural formalities similar to the rules imposed upon administrative agencies. App. 63a. See also id. (under government's view, Lopez "would have constituted little more than historical irrelevancy").

The court below nonetheless evaluated the Congressional findings, and concluded that most of them did not show the effect of gender-based, animus-motivated violent

felonies on interstate commerce, but rather the effects of all violence against women and/or all domestic violence on the economy. App. 64a-66a. See also U.S. Pet. 7, 10-11 (relying upon similar statistics). It found that the less specific findings relating to the violence being regulated by Subtitle C -- involving reduced travel to dangerous areas, and fewer transactions by victims with businesses that engage in interstate commerce -- failed to meet the "substantially effects" test outlined in Lopez. App. 66a-70a.

In addressing petitioners' remaining arguments, the en banc Court of Appeals concluded that (1) there was no special dispensation in the Constitution for laws labelled "civil rights" laws, that rubric being undefined in or outside of the Constitution, and that any such law must be passed pursuant to a specific enumerated power (App. 70a-76a), (2) cases prior to Lopez did not require it to uphold Subtitle C for the same reasons they did not require this Court to sustain the GFSZA, i.e., because the earlier decisions involved statutes which regulated "economic activity" in a way that the possession of guns around schools or violent gender-based animus-motivated felonies did not (App. 80a-83a), and (3) petitioners' arguments that Subtitle C did not offend principles of federalism misunderstood the principle of federalism that motivated this Court in Lopez, viz., the logical consequences of the arguments proffered to uphold the GFSZA as opposed to the particular intrusiveness of any specific law (App. 88a). (On this last point, the Fourth Circuit noted that the GFSZA was careful to leave intact state definitions, and did not preempt state law -- indeed, it concluded that the GFSZA was more respectful of state law than Subtitle C. Compare App. 42a n.10 with App. 44a.)

The court then turned to Section 5 of the Four-

teenth Amendment, the other proposed basis for Subtitle C. After noting the history of the Amendment -- and specifically, the failed Bingham Amendment which would have given Congress a general power to legislate with respect to many areas of traditional state responsibility -- the court concluded that Section 5 only permitted Congress to legislate directly against state action. The court found support for that conclusion in two decisions of this Court: United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883), which the Fourth Circuit analyzed in great detail. App. 104a-111a. It noted that each case involved a statute that had been passed only after extensive legislative hearings demonstrating that the States had failed to protect African Americans against private harms violative of state law. App. 120a-21a, 124a-25a. See also App. 119a-20a ("as an historical matter, it is indisputable that Congress enacted those civil rights laws for the precise purpose of remedying massive and systemic violations of equal protection by the States").

The Court of Appeals also rejected the petitioners' argument that Harris and the Civil Rights Cases had been "tacitly" overruled by later cases. App. 126a-41a. The Fourth Circuit noted that this Court had just recently reaffirmed the Section 5 analysis of those cases in City of Boerne v. Flores, 521 U.S. 507, 524-25 (1997). App. 104a, 141a-42a.

Despite the fact that it deemed the matter controlled by binding precedent, the Fourth Circuit also applied City of Boerne and engaged in a "means/ends" analysis to determine if Subtitle C was appropriate legislation for enforcing Section 1 violations. It concluded that much of the legislative history did not demonstrate the kind of purposeful discrimination by state actors required by the

Equal Protection Clause. App. 151a-60a. See Personnel Administrator of Massachusetts v. Feeny, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."). Rather, its review of all of Title IV and its structure and legislative history demonstrated that Subtitle C was designed to send a "signal" that might overcome subtle societal prejudices. App. 160a.

The Fourth Circuit also concluded that there was no "congruence and proportionality" between Section 13981 and any violation of the Equal Protection Clause. It relied specifically upon the facts that the statute does nothing to remedy or correct any discriminatory enforcement by the States and that the existence or non-existence of a cause of action under Section 13981 in any specific case has nothing to do with any finding of an Equal Protection violation. App. 160a-63a.

Finally, the Fourth Circuit concluded that petitioners' bold theory of Section 5 would allow the federal government to regulate directly in any area (like criminal law and domestic relations) in which there is any evidence that state procedures or institutions have any gender or racial bias. It noted that the same studies relied upon in passing Subtitle C also found bias in many other areas of law, and would (under petitioners' theory) permit Congressional takeover of such areas. App. 164a-66a. See also App. 74a-76a, 89a. So, too, a finding of State "failure" to enforce robbery or burglary laws protecting property rights against private invasion would permit Congress

to regulate those areas as well, as a means of enforcing the Section 1 provision precluding State deprivations of property without due process. App. 165a. The Fourth Circuit concluded that it could not give its imprimatur to such expansive theories of Congressional authority under Section 5. App. 166a.

REASONS FOR DENYING THE WRIT

The separate petitions for the United States and Brzonkala rely significantly on the fact that the Fourth Circuit declared a statute of Congress unconstitutional.[4] To be sure, that is generally deemed a factor in this Court's consideration of a petition for a writ of certiorari.

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[4] Contrary to Brzonkala's claim that the court below "invalidated the entirety of the civil remedy . . . on its face" (Brzonk. Pet. 17 n.4), the decision below did not address the constitutionality of Subtitle C in contexts other than those raised by the allegations of the Complaint. Subtitle C also applies to (1) those who act under color of state authority (42 U.S.C. § 13981(c)) and (2) violent acts in any "special maritime, territorial, or prison jurisdiction of the United States" (42 U.S.C. § 13981(d)(2)(A)).

Brzonkala asserts that the statute in question can be sustained here "as applied" because the Complaint alleges that she terminated her college education nearly a year after the alleged rape, and thus did not pay her college tuition and other fees. Brzonk. Pet. 17 n.14. Brzonkala cannot claim that any interstate commercial transaction was affected by this purported consequence because she resides in Fairfax, Virginia. Complaint ¶ 7. The tenuous connection she cites between the alleged attack and the failure of an intrastate commercial transaction nearly one year later is far weaker than the connection between the possession of a gun at issue in Lopez and a more immediate commercial transaction. As the en banc Fourth Circuit noted, Alfonso Lopez had brought his gun to school to sell it for $ 40 so that it could be used in a gang war. App. 25a; United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993), aff'd, 514 U.S. 549 (1995).

But, it is not dispositive, and petitioners have provided no other reason at all for this Court to grant the petitions.

The United States does not pretend that there is any circuit split on any significant question. Its other reasons for seeking the writ are based on its contentions that the Fourth Circuit erred in its decision. But claims of error by the court below are usually insufficient reason to grant the writ. Moreover, the errors that the United States assigns to the Fourth Circuit are virtually identical to the arguments that the en banc Fourth Circuit considered at great length and rejected. In fact, for a petition that relies so heavily on assignment of error to the Fourth Circuit, the government's petition is remarkably bereft of any effort to respond to the Fourth Circuit's analysis and repudiation of the government's arguments.

Brzonkala goes further, and, in addition to assigning error to the decision of the court below, claims that the decision creates numerous circuit splits. However, these circuit splits are fabricated, and are created primarily by erroneously attributing propositions of law to the Fourth Circuit.

A. The Fact That The Court Of Appeals Found An Act Of Congress Unconstitutional Is Not A Sufficient Ground To Grant The Petitions

Prior to 1988, part of this Court's "mandatory" appellate jurisdiction was set forth in 28 U.S.C. § 1252, which gave this Court appellate jurisdiction over any civil case in which the United States was a party and a federal court declared a federal law unconstitutional. Heckler v. Edwards, 465 U.S. 870, 878 (1984). Section 1257(1) of the Judicial Code provided for similar appellate jurisdic-

tion whenever the highest state court in which a decision could be had decided against the validity of an act of Congress. 28 U.S.C. § 1257(1) (repealed). Key v. Doyle, 434 U.S. 59, 61 n.3 (1977).

In 1988, Congress -- with the support of the members of this Court[5] -- passed Public Law 100-352, known as the Supreme Court Case Selection Act of 1988. That statute repealed 28 U.S.C. § 1252, and rewrote Section 1257 so that such cases can be reviewed only by writ of certiorari. The plain effect of these amendments was to give this Court the discretion to reject cases in which a federal or state court declared an act of Congress invalid, even when the United States was a party (just as this Court had such discretion prior to those amendments when the United States was not a party to a federal civil case).

Both before and after the amendments, this Court has denied review when Courts of Appeals have declared statutes unconstitutional. See, e.g., Valley Broadcasting Co. v. United States, 107 F.3d 1328, 1336 (9th Cir. 1997) (holding that 18 U.S.C. § 1304 violates the First Amendment), cert. denied, 118 S. Ct. 1050 (1998); ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996) (striking down 42 U.S.C. § 300j-24(d), a provision of the Lead Contamination Control Act of 1988 as unconstitutional), cert. denied, 521 U.S. 1129 (1997); Wilson v. NLRB, 920 F.2d 1282 (6th Cir. 1990) (declaring religious objector provision of

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[5] See S. Rep. 95-985 (1978) Appendix I (letter from all nine Justices supporting repeal of mandatory jurisdiction); Remarks Of Justice William Brennan at the Third Circuit Judicial Conference, September 9, 1982 (hereinafter, "Brennan Remarks"), p. 4 ("every member of the Court devoutly hopes [bill to end mandatory jurisdiction] will be adopted").

the National Labor Relations Act, 29 U.S.C. § 169, unconstitutional under the Establishment Clause), cert. denied, 505 U.S. 1218 (1992); Rayburn v. General Conference Of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (declaring Title VII provisions against race and sex discrimination unconstitutional as applied to church), cert. denied, 478 U.S. 1020 (1986).

There is no hierarchy of federal laws, such that this Court should grant a petition for writ of certiorari whenever a state or lower federal court invalidates an "important" act of Congress, but permitting denial of the petition when a state or lower federal court invalidates an "unimportant" act of Congress. When a federal statute is declared unconstitutional, this Court has historically required the presence of other factors militating in favor of exercising its certiorari jurisdiction before granting a petition. Here, there is none.

B. The Accusations Of Error Ignore Or Distort The Opinion Of The Fourth Circuit *En Banc*

The additional factor cited by the United States is that the Fourth Circuit "adopt[ed] an unduly restrictive view of the reach of Congress's powers under both the Commerce Clause and the Fourteenth Amendment." U.S. Pet. 19. In other words, the government believes that the Fourth Circuit was wrong on the underlying substantive issues. But this Court does not generally exercise its discretionary jurisdiction simply to correct errors in the decisions of the lower courts. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, Supreme Court Practice, § 4.17 at 193 (7th ed. 1993) (hereinafter "Stern, et al., Supreme Court Practice") ("It has been reiterated many times that the Supreme Court

is not primarily concerned with the correction of errors in lower court decisions"); Brennan Remarks, p. 3 ("ever since the Judges Bill of 1925 the Supreme Court . . . has not been expected to take on the function of primarily -- or even largely -- correcting errors committed by other courts").

Moreover, the "errors" assigned by the petitioners are easily refuted just by reviewing the decision of the Fourth Circuit.

1. Both petitioners contend that the Fourth Circuit erred because Lopez did not preclude Congress from regulating non-economic activity unrelated to any comprehensive scheme of commercial regulation. U.S. Pet. 19; Brzonk. Pet. 19. But neither petitioner explains why this Court repeatedly referred to the non-economic nature of the activity being regulated in Lopez, and neither cogently explains how the non-economic nature of the activity should be considered in any analysis under the Commerce Clause. The Fourth Circuit, after all, analyzed Subtitle C under two alternative assumptions: first, that the non-economic nature of the activity and the absence of a jurisdictional requirement were dispositive and, second, that those factors were merely "presumptive" of a law outside of Congress's Commerce Clause authority. Petitioners apparently believe that both theories are wrong; but they offer no explanation for this Court's repeated referrals to the non-economic nature of the activity in its decision in Lopez.[6]

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[6] The United States states only that this Court "observed" that the statute neither regulated an economic activity nor contained a jurisdictional element. U.S. Pet. 20. In an effort to show that this "observa-

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To the extent an alternative theory can be gleaned from the petitions, the United States seems to argue that, if the activity being regulated is non-economic, it merely imposes a requirement of Congressional findings that would not exist otherwise. U.S. Pet. 21. Nothing in Lopez itself so holds. Its brief one paragraph reference to the absence of Congressional findings in that case does little more than reject the Fifth Circuit holding that findings were necessary and state that they might have been helpful. Lopez, 514 U.S. at 562-63. Neither petitioner bothers to respond to the Fourth Circuit's rejection of their "formalism" argument. The Court of Appeals noted that (1) if findings were dispositive, it was rather odd for this Court not to mention that fact since there were in fact findings concerning the GFSZA before this Court in Lopez (App. 63a), (2) if findings were dispositive, this Court's analysis of the government's and dissents' theories of how gun possession affected interstate commerce was superfluous (App. 55a-56a, 61a), (3) both the Attorney General and Congress concluded that the findings related to the GFSZA were insufficient to render it constitutional (App. 63a-64a), and (4) an interpretation that Lopez only im-

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[6](...continued)
tion" was unimportant, the United States then quotes from a part of the Lopez decision in which this Court was simply reviewing its previous precedents (and, in the specific instance, quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)). U.S. Pet. 20. (The United States ignores the Lopez Court's distinction of Wickard. Lopez, 514 U.S. at 560.) It was no doubt this kind of sophistry that led the en banc court to state that petitioners "come dangerously close to affirmatively misrepresenting the holding and analysis of *Lopez*" in the Fourth Circuit. App. 82a n.20. See also App. 123a (referring to petitioners' "breathtaking ahistoricism"); App. 77a ("we find such a superficial understanding of Lopez, especially by the United States, surprising").

posed a procedural or formal requirement for Congress would be inconsistent with the well-articulated concern of the Lopez Court that Congress not be granted a general police power (App. 61a-62a). See also Seminole Tribe v. Florida, 517 U.S. 44, 64 (1996) ("'If Hans [v. Louisiana, 134 U.S. 1 (1890)] means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all'" quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 36 (1989) (Scalia, J. dissenting), overruled, Seminole Tribe v. Florida, 517 U.S. 44 (1996)).

2. Petitioners claim that the Fourth Circuit erred in concluding that Subtitle C presented any federalism concerns. U.S. Pet. 23-25; Brzonk. Pet. 22-23. The government (unlike Brzonkala) briefly mentions this Court's real concern about federalism in Lopez. U.S. Pet. 21 ("The Court observed that it had been offered no rationale to uphold the [GFSZA] that was not capable of infinite expansion"). But the government offers no explanation as to why that same concern is not equally applicable to Subtitle C. Nor does it make any effort to refute the conclusions of the lower courts that the petitioners' theories of Commerce Clause authority would be sufficient to regulate any and all crime, insomnia, exercise regimens, and many other aspects of human existence that can be said to significantly affect our aggregate ability to consume and produce in interstate commerce. App. 38a.

Instead, the United States and Brzonkala attribute error to the Fourth Circuit by focusing on a series of other federalism concerns. For example, the United States relies upon one footnote in Lopez (quoting the signing statement of President Bush, who apparently objected to the bill he was signing into law) stating that the GFSZA

"overrode" State laws, and argues that Subtitle C is more deferential to state law. U.S. Pet. 23-24; see also id. 24-25 & n.11. The United States cannot (and does not bother to) refute the Fourth Circuit's careful analysis that the GFSZA was just as respectful, indeed, more respectful, of state law than Subtitle C. App. 41a-42a, n.10.

The United States also relies on the Congressional finding that States were doing an inadequate job of dealing with gender-based, animus-motivated crime in passing Subtitle C. U.S. Pet. 24. It cites no authority for the proposition that the Commerce Clause power expands and contracts depending upon how Congress has analyzed the States' performance in a particular area. Such a proposition would be inconsistent with the repeated holdings of this Court that Congress's Commerce Clause power is plenary. Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) ("At least since 1824 Congress' authority under the Commerce Clause has been held plenary"); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) ("This power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution" quoting Gibbons v. Ogden, 22 U.S. 1 (1824)). Moreover, the argument has the same defects just noted with the "legislative-findings-are-dispositive" argument since a finding that the States were incapable of preventing the possession of guns around schools was before the Court in Lopez. See n.1, supra.

Brzonkala repeatedly assails the Fourth Circuit for its overly broad interpretation of a "traditional state concern." E.g., Brzonk. Pet. 16-17, 21, 22-23. She also suggests that Congressional authority is more expansive when it is legislating with respect to "civil rights" or in

removing discriminatory barriers to participation in the economy. Brzonk. Pet. 22-23. She, too, can cite no authority (because none exists) to suggest that the Commerce Clause power waxes and wanes depending upon whether Congress is legislating in the civil rights area or in an area of traditional state concern. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States."). (The civil rights statutes at issue in cases like Katzenbach v. McClung, 379 U.S. 294 (1964) regulated commercial establishments (restaurants and hotels) with a far closer relationship to interstate travel than violence in general, much less gender-based, animus-motivated violence.) Certainly, nothing in the Fourth Circuit opinion suggests that "commerce among the states" is an elastic grant of authority that grows when exercised in special areas.[7]

3. With respect to Section 5, the United States claims that the Fourth Circuit erred in relying upon United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883). It makes the same distinctions of those cases that it made before the Fourth Circuit, viz., that the statutes involved in those cases (the Civil Rights Acts of 1871 and 1875) attempted to impose Constitutional norms of non-discrimination upon private parties (U.S. Pet. 27), and were "premised on the assumption that private conduct can violate the Fourteenth Amendment" (U.S. Pet. 28). As in the lower courts, the United States

[7] Indeed, Brzonkala's arguments here conflict with her primary argument that the Fourth Circuit erred in adopting a "per se rule against regulating non-economic activity." Brzonk. Pet. 15. If it is a per se rule, other factors are irrelevant.

cannot find anything in those cases which actually states anything like that, and, indeed, its own citations to the Civil Rights Cases demonstrates that this Court's concern was the failure of the Civil Rights Act of 1875 to address and remedy state violations of the Equal Protection Clause. U.S. Pet. 27 (quoting the Civil Rights Cases). The United States also ignores the long history cited by the Fourth Circuit, App. 118a-25a, which demonstrates that those laws were, in fact, efforts to remedy perceived defects in state enforcement of state law.

4. Both Brzonkala and the United States assert ipse dixit that the Fourth Circuit erred because Congress passed Subtitle C to remedy Equal Protection violations. E.g., U.S. Pet. 26; Brzonk. Pet. 28. They do not address the legislative history and other factors cited by the Fourth Circuit refuting that contention. App. 155a-60a.

5. Finally, the United States claims that the Fourth Circuit erred in not finding Section 13981 appropriately remedial. It argues that Subtitle C is remedial because it affords victims of gender-based, animus-motivated violent felonies an opportunity to sue in federal court and obtain redress not controlled by the State. U.S. Pet. 29. It does not explain why Subtitle C gives concurrent jurisdiction to state courts, and it does not explain how this remedy does anything at all to correct the purported biases in State criminal courts that were the purported impetus for the civil remedy.[8] The United States

[8] The United States also quotes a 1990 Senate Report to the effect that the remedy is proper because federal judges have "the power to screen out jurors who harbor irrational prejudices against, for example, rape victims." U.S. Pet. 29. The government does not say why state

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further extols the remedy because it is "entirely unintrusive, . . . displaces no state law and prohibits no state action." Id. These are rather odd virtues for a law purportedly designed to remedy pervasive and intentional state discrimination.

C. Brzonkala's "Circuit Splits" Are Fabricated

The United States concedes that there is no circuit split on Subtitle C's constitutionality. U.S. Pet. 18. It does rely upon the facts that the decision of the en banc court was "sharply divided" and that most district courts have upheld the statute. Id. But these are not traditional factors considered by this Court in exercising its discretionary jurisdiction. E.g., Stern, et al., Supreme Court Practice, § 4.8 at 178 ("The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court").

Unlike the United States, Brzonkala claims four or more "circuit splits." She creates these so-called splits by misreading the opinion of the Fourth Circuit and/or the opinions of other courts.

With respect to the Commerce Clause, Brzonkala first claims that the Fourth Circuit's "per se rule" that Congress cannot regulate non-economic activity with no interstate nexus under the "substantially affecting" branch of Commerce Clause authority is inconsistent with seven

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[8](...continued)
judges lack this power, or, why Subtitle C would give those judges concurrent jurisdiction if they did lack it.

other circuits' interpretation of Lopez (which purportedly hold that Congress can regulate non-economic conduct). Brzonk. Pet. 13. Of course, Brzonkala neglects to mention the Fourth Circuit found that rule unnecessary to the decision before it. That is, it concluded that Subtitle C is unconstitutional "[e]ven if . . . Congress may regulate non-economic activities absent jurisdictional elements in at least some circumstances." App. 31a-32a.

Moreover, when one examines the decisions of the other circuits, the so-called split is even more contrived. Other circuits simply have a narrower definition of "economic" activity than the Fourth Circuit (and thus need to give Congress authority over "non-economic" activity to uphold the same laws that the Fourth Circuit upholds as regulations of "economic" activity). Compare App. 25a (citing Fourth Circuit panel decision in Hoffman v. Hunt, 126 F.3d 575, 586-87 (4th Cir. 1997), cert. denied, 118 U.S. 1838 (1998) upholding the Freedom of Access to Clinic Entrances Act of 1994 ("FACE") because it regulated conduct "'closely and directly connected with an economic activity' -- the operation of abortion clinics") with United States v. Bird, 124 F.3d 667, 675 (5th Cir. 1997) (cited at Brzonk. Pet. 15) (although FACE regulated non-economic activity, it was valid because it was "'an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut unless the intrastate activity were regulated,'"), cert. denied, 118 U.S. 1189 (1998). See also Brzonk. Pet. 15 n.13.

Indeed, regardless of whether they characterize activity like that regulated in FACE -- closely connected to a specific economic transaction or business -- as "economic" or "non-economic," the circuit courts have consistently required at least that close connection. E.g., United States

v. Olin Corp., 107 F.3d 1506, 1511 (11th Cir. 1997) (cited at Brzonk. Pet. 15) (Congress could regulate pollution of a chemical manufacturer because its "actions have an economic character"); United States v. Serang, 156 F.3d 910, 913 (9th Cir.) ("In Lopez, the Supreme Court held that, to be regulated, intrastate economic or commercial activities must substantially affect interstate commerce in the aggregate, while non-economic or non-commercial activities must individually have a substantial effect on interstate commerce"), cert. denied, 119 S. Ct. 627 (1998).[9]

Brzonkala also claims that the Fourth Circuit adopted a "per se rule that intrastate conduct that has an 'indirect' effect on interstate commerce cannot substantially

[9] Brzonkala takes two other tacks in her efforts to manufacture circuit splits. First, she relies upon Child Support Recovery Act cases without apprising the Court that that statute (as the cases she identifies recognize) has a specific interstate requirement. Brzonk. Pet. 16. Second, she cites non-majority opinions in contravention of standard citation rules requiring them to be identified as such. Thus, she cites Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998) in the text on page 14 of her petition, and only in a footnote -- where she relies upon Judge Wald's own opinion of how similar her views are to those of Judge Henderson -- is it even hinted that the opinion upon which she relies was joined by only one judge. In fact, Judge Henderson's concurrence focused on the regulation's close commercial links, see Babbitt, 130 F.3d at 1058 (Henderson, J. concurring) (the challenged regulation "regulates and substantially affects commercial development activity which is plainly interstate"). See generally The Bluebook, A Uniform System of Citation 65 (16th ed. 1996) (Rule 10.6) (parenthetical information should indicate whenever a citation "is not the single, clear holding of a majority of the court"). See also Brzonk. Pet. 17 (citing an opinion in United States v. Kirk, 105 F.3d 997 (5th Cir.), cert. denied, 118 S. Ct. 47 (1997) without mentioning that only four members of an en banc court subscribed to it).

affect interstate commerce." Brzonk. Pet. 16. See also Brzonk. Pet. 20 ("The court of appeals revived the formalistic distinction between direct and indirect effects as a rationale for refusing to defer to Congress' findings"). She cites four different pages from the Fourth Circuit opinion which purport to support that assertion, but none of them do. The Fourth Circuit never held that there was any "bright line" between direct and indirect effects.

Brzonkala also claims that the Fourth Circuit gave an overly broad definition to "'areas of traditional state concern' upon which the exercise of the federal commerce power may not intrude." Brzonk. Pet. 16. Id. at 17 ("overly broad characterization of exclusive state concerns" (emphasis added)). She claims that such an interpretation "directly contradicts rulings of other courts of appeals that have rejected treating the entire fields of tort and criminal law as areas of exclusive or traditional state concern." Id. But the Fourth Circuit never held that there are "exclusive state concerns" upon which the federal government cannot intrude -- nor do the cases she cites -- and Brzonkala cites nothing in the record to suggest otherwise. Brzonk. Pet. 17. See generally Gregory v. Ashcroft, 501 U.S. at 460. Indeed, while the court below did note that petitioners' expansive interpretation of Commerce Clause authority would allow Congress to intrude upon traditional state concerns, it specifically disavowed any need to rely upon such arguments. App. 73a-74a n.17 ("In reliance upon inapposite precedent, however, [petitioners] maintain that crime motivated by animus uniquely implicates federal interests and falls outside traditional areas of state concern. Even were this precedent relevant to the scope of congressional authority under the Commerce Clause . . . " (emphasis added)).

Finally, with respect to Section 5, Brzonkala claims that the decision of the Fourth Circuit is "in tension with" the rulings of other circuit courts "which squarely uphold Congress' authority to regulate conduct that itself is not unconstitutional." Brzonk. Pet. 27 n.18. But the Fourth Circuit (just like the courts in the cases Brzonkala cites, all of which involved state entities) did recognize that Congress could regulate state activities that do not violate Section 1. App. 128a. Like her "conflicts," the "tension" Brzonkala cites is fabricated.

CONCLUSION

This Court should deny the petition.

Michael E. Rosman*
(Counsel of Record)
Hans F. Bader
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St., NW
Suite 300
Washington, DC 20036

W. David Paxton
GENTRY LOCKE RAKES & MOORE
800 Crestar Plaza
P.O. Box 40013
Roanoke, VA 24038-0013

Attorneys for Antonio Morrison

Joseph G. Painter, Jr.
Post Office Drawer A
Blacksburg, VA 24063-1015

Attorney for James L. Crawford